

Message

From: Boydston, Michael [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=DCF50BF734B64D33AE1C963B175A3487-BOYDSTON, MICHAEL]
Sent: 6/10/2015 2:36:18 PM
To: Varilek, Kimberly [Varilek.Kimberly@epa.gov]; Siegal, Tod [Siegal.Tod@epa.gov]; Chin, Lucita [Chin.Lucita@epa.gov]
Subject: RE: Discuss Dewey Burdock NHPA questions
Attachments: ML15120A299.annotated.pdf

Thanks, Kim — that's very helpful.

I should have sent this to you and Tod earlier, but attached is the decision from the Atomic Safety and Licensing Board (ASLB=NRC's 1st-level administrative review body) on the challenge to the NRC license. Relevant discussion is mainly pp. 33–45. In particular:

With respect to identifying historic properties, the NRC Staff has complied with the NHPA requirement to make a good faith and reasonable effort to identify properties that are eligible for inclusion in the National Register of Historic Places within the Dewey-Burdock ISL project area. The ACHP's guidance states that a reasonable and good faith effort may consist of "one or more methodologies" of identifying historic properties,²⁰⁹ and the Staff used, to varying extents, four of the five methodologies specified in ACHP regulations: background research, consultation, field investigations, and field surveys.²¹⁰ The only methodology that the Staff did not use was oral history interviews.²¹¹ We find that these efforts satisfy the NHPA with respect to historic properties.

²⁰⁶

The more difficult question is whether the methodologies the NRC Staff employed to identify tribal cultural, religious and historic resources satisfied the NHPA and the NEPA hard look.²¹² Although the NRC Staff points to the concurrence of the ACHP and the South Dakota State Historic Preservation Officer in the context of the NHPA Section 106 investigation as evidence that NEPA's hard look has been satisfied,²¹³ it does not follow that a review that satisfies the NHPA necessarily satisfies NEPA requirements to take a hard look at cultural resources affected by a project.²¹⁴ Although the NHPA and NEPA resemble each other in certain respects, compliance with the NHPA "does not relieve a federal agency of the duty of complying with the [environmental] impact statement requirement 'to the fullest extent possible.'"

...For a variety of reasons,²¹⁷ the FSEIS in this proceeding does not contain an analysis of the impacts of the project on the cultural, historical

and religious sites of the Oglala Sioux Tribe and the majority of the other consulting Native American tribes.²¹⁸ The field surveys conducted in 2013 by members of seven tribes and the three sets of findings submitted do not satisfy this requirement.²¹⁹ Because the cultural, historical, and religious sites of the Oglala Sioux Tribe have not been adequately catalogued, the FSEIS does not include mitigation measures sufficient to protect this Native American tribe's cultural, historical, and religious sites that may be affected by the Powertech project.

Accordingly, as to Contention 1A, the Board finds and concludes that the FSEIS has not adequately addressed the environmental effects of the Dewey-Burdock project on Native American cultural, religious and historic resources. Without additional analysis as to how the Powertech project may affect the Sioux Tribes' cultural, historical, and religious connections with the area, NEPA's hard look requirement has not been satisfied, and potentially necessary mitigation measures have not been established. The NRC Staff did not give this issue its required hard look in the FSEIS, and therefore the Record of Decision is incomplete.

...

With respect to Contention 1B, the NRC Staff/tribal consultation process broke down,²²⁰ and the vast majority of the consulting tribal parties, including the Oglala Sioux Tribe, did not participate in the field survey opportunity provided by the NRC Staff and Powertech....

As to Contention 1B, the Board finds and concludes that the consultation process

between the NRC Staff and the Oglala Sioux Tribe was inadequate.

The remedy ordered for both was additional consultation with the Oglala Sioux Tribe, with periodic reports to the ASLB.



ML15120A299.a...

Michael Boydston
Associate Regional Counsel, EPA Region 8
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From: Varilek, Kimberly
Sent: Wednesday, June 10, 2015 8:18 AM
To: Boydston, Michael; Siegal, Tod; Chin, Lucita
Subject: RE: Discuss Dewey Burdock NHPA questions

Good Morning – I’m forwarding a CLE presentation that I attended in MT in April this year, and Ms. La Seur (author of the ppt) provided an informative presentation regarding NHPA 106 consulting in various contexts. I asked her for a copy of her presentation and I’m forwarding to you for thought. Talk with you soon! – Kim V.

<< File: UM Indian Law CLE 4-16-15.pptx >>

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-----Original Appointment-----

From: Boydston, Michael
Sent: Tuesday, June 09, 2015 3:34 PM
To: Siegal, Tod; Chin, Lucita
Cc: Varilek, Kimberly
Subject: Discuss Dewey Burdock NHPA questions
When: Wednesday, June 10, 2015 9:00 AM-9:45 AM (UTC-07:00) Mountain Time (US & Canada).
Where: Call in: 866-299-9141, code 81519443#. In R8, Cloud Dancer room